

ANSWERS TO
QUESTIONS ON CONDEMNATION LAW
FROM DIVISION OF RIGHT OF WAY AND UTILITIES
BY
OFFICE OF GENERAL COUNSEL

1. WHY ARE THERE NON-COMPENSABLE ITEMS WHEN A DAMAGE ACTUALLY EXISTS?

This question is best answered in Helmer v. Colorado Southern, N. O. & P. Ry. Co., 47 SO. 443, 444, 122 La. 141:

“Mere consequential injuries to an owner of property claimed to have been damaged by a public improvement, arising from discomfort, disturbance, injury to the business, and the like, remain, as before, “damna absque injuria” – particular sacrifices which society has the right to inflict for the public good.”

Also, J. A. & C. E. Bennett v. Winston-Salem Southbound Ry. Co., 87 S. E. 133, 170 N. C. 389.

2. WHAT ARE THE VARIOUS ITEMS THAT ARE CONSIDERED NON-COMPENSABLE?

- a) NOISE - Com., Dept. of Highways v. Cleveland, Ky., 407 SW 2d 471 (1966) held that noise is not compensable since it does not result from the condemnation.
- b) CIRCUITY OF TRAVEL – Com., Dept. of Highways v. Rosenblatt, Ky., 416 SW 2d 754 (1967) held that mere subjection to circuity of travel is non-compensable. Also, Com., Dept. of Highways v. Gardner, Ky., 413 SW 2d 80 (1967).
- c) DIVERSION OF TRAFFIC – Com., Dept. of Highways v. Hopson, Ky., 396 SW 2d 805 (1965) held that relocation of a highway is a non-compensable factor.
- d) BUSINESS LOSSES – Com., Dept. of Highways v. Sherrod, Ky., 367 SW 2d 844 (1963) held that loss of business is non-compensable. Also, Com., Dept. of Highways v. Rogers, Ky., 399 SW 2d 706 (1965).
- e) LOSS OF ACCESS – Com., Dept. of Highways v. Carlisle, Ky., 363 SW 2d 104, 107:

“...only access right the landowner has is a right of reasonable access to the highway system.”

- f) INTERRUPTION OF BUSINESS – Com., Dept. of Highways v. Sherrod, Ky., 367 SW 2d 844. This is non-compensable because, when it occurs because of a temporary closing of the highway, it is a loss suffered by the public generally.
- g) INCONVENIENCE – Com., Dept. of Highways v. Cammack, Ky., 40 SW 2d 615 (1966) held, ordinarily, inconvenience is not compensable in eminent domain cases.

- h) INCONVENIENCE (FARMING) – Com., Dept. of Highways v. Roberts, Ky., 390 SW 2d 155 (1965) held this is not a compensable item as such.
- i) LOSS OF PARKING – Com., Dept. of Highways v. Smith, KY., 413 SW 2d 72, 74 (1967):

“The law is clear that the loss of parking spaces on the right of way...so long as there remains reasonable access to the property, may not be considered in determining values.”
- j) LOSS OF INGRESS AND EGRESS – Com., Dept. of Highways v. Smith, Ky., 413 SW 2d 72, 74 (1967):

“...loss of unrestricted ingress and egress where there remained reasonable access to the property could not be considered in determining before and after values.”
- k) NON-WILLINGNESS TO SELL – Com., Dept. of Highways v. Woolum, Ky., 415 SW 2d 83 (1967) held, statements which evince condemnee’s unwillingness to sell are improper in determining residual value.
- l) GOOD WILL – This is defined as a “fleeting, intangible something, and is not corporeal property, but is that asset, intangible in form, which is an element responsible for profits in a business.” O’Hara v. Lance, Arizona, 267 P. 2d 725, 727 (1960). It is not compensated because it is too speculative.

3. WHAT IS CIRCUITY OF TRAVEL?

This is answered in Com., Dept. of Highways v. Burns, Ky., 394 SW 2d 923, 925 (1965):

“...the kind of circuitry of travel that is a non-compensable factor is travel from the landowner’s property to other places on the highway system.”

Support for this is found in Com., Dept. of Highways v. Rosenblatt, Ky., 416 SW 2d 754 (1967).

4. SPECIFICALLY, WHEN AND IS CIRCUITY OF TRAVEL EVER COMPENSABLE?

In Com., Dept. of Highways v. Dennis, Ky., 409 SW 2d 292 (1966) it is stated that circuitry of travel is compensable, if ever, as an element of damage in computing residual value, when the travel involved is from one part of the owner’s property to another. Also Com., Dept. of Highways v. Burns, Ky., 394 SW 2d 923 (1965).

5. WHAT IS REASONABLE ACCESS?

Com., Dept. of Highways v. Sherrod, Ky., 367 SW 2d 844, 858, 859 (1963):

“(reasonable access) has to mean that (the property owner) has only the right of access to such highways, and of such surfaces, as the state chooses to provide in the reasonable administration of its highway system.”

Also, Com., Dept. of Highways v. Proctor, Ky., 412 SW 2d 252 (1967).

6. WHAT IS UNREASONABLE ACCESS?

Com., Dept. of Highways v. Adkins, Ky., 396 SW 2d 768, 770 (1965):

“The landowner cannot be deprived of reasonable access without just compensation. The question whether or not the remaining access is reasonable is resolved by the court as a matter of law.”

For reiteration, Com., Dept. of Highways v. Dotson, Ky., 405 SW 2d 30 (1966).

7. IS INTERRUPTION OF BUSINESS EVER COMPENSABLE?

No, except where there has been some element of an unnecessary closing or interference. Com., Dept. of Highways v. Sherrod, Ky., 367 SW 2d 844 (1963) and Wine v. Commonwealth, 301 Mass. 451, 120 A. L. R. 889, 890.

8. IS LOSS OF BUSINESS EVER COMPENSABLE?

Not per se – Com., Dept. of Highways v. Sherrod, Ky., 367 SW 2d 844 (1963). However, courts do compensate when the land cannot be utilized for its highest and best use. which seems to be basically the same thing. This is usually applied when a farm is cut in two and cannot be used as profitably thereafter for agriculture. Com. Dept. of Highways v. Teater, Ky., 397 SW 2d 137 (1965); Com., Dept. of Highways v. Dennis, Ky., 408 SW 2d 444 (1966); Com., Dept. of Highways v. Sea, Ky., 402 SW 2d 842 (1966). The courts say that, while this item is not itself compensable, it is relevant to the land’s residual value. In Com., Dept. of Highways v. Smith, Ky., 390 SW 2d 194 (1965), the court allowed the jury to include the finding that a restaurant could not be operated profitably after the taking in computing the residual value of the land.

9. IS DIVERSION OF TRAFFIC EVER COMPENSABLE?

Yes, in some instances. Com., Dept. of Highways v. Hopson, Ky., 396 SW 2d 805 (1965) says loss due to relocation of a highway is a non-compensable factor per se, but in Com., Dept. of Highways v. Brown, Ky., 392 SW 2d 50 (1965), a highway was diverted through defendant’s land, and the court allowed this to be included as an element of damages in computing the residual value of the land. Com., Dept. of Highways v. Johns, Ky., 421 SW 2d 845, 846 (1967):

...the fact that there has been a disjunction of the land (due to the taking) is a proper consideration insofar as it affects the market value of the remaining tracts.

The same point is made in Com., Dept. of Highways v. Burns, Ky., 394 SW 2d 923 (1965).

10. IS DAMAGE OR LOSS OF VALUE DUE TO EXERCISING POLICE POWER EVER COMPENSABLE?

No. Where the power is exercised for the benefit and protection of the public, no compensation is allowed. Sturgill v. Com., Dept. of Highways, Ky., 384 SW 2d 89 (1964). Proctor v. Com., Dept. of Highways, Ky., 412 SW 2d 252, 253 (1967):

The citizens' rights are subject to a reasonable exercise of police power by the Commonwealth.

11. WHAT ARE CONSIDERED TRADE FIXTURES?

This is defined in Bank of Shelbyville v. Hartford, Ky., 104 SW 2d 217, 218, 219 (1937):

The question then arises, what is a trade fixture? We find that it has been defined as follows: "Trade fixtures" is a term usually employed to describe property which a tenant has placed on rented real estate to advance the business for which it is leased and which may, as against the lessor, be removed at the end of the tenant's term. Winnike v. Heyman, 185 Iowa, 114, 169 N. W. 631, 632. Articles attached by the tenant to the demised premises for trade purposes are "trade fixtures."

Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn., 107, 145, N.W. 964, 965. To constitute any chattel that has been attached to the freehold a "trade fixture," it is only necessary that it be devoted to what is known in the law of fixtures as a trade purpose, and the form or size of the annexed chattel is immaterial. Waverly Park Amusement Co., 197 Mich. 92, 163 N.W. 917, 918. A trade fixture, within the rule that a lessee, as between himself and the lessor may remove a trade fixture, is an article annexed by the lessee to the real estate to aid him in carrying on his trade or business on the premises. Ray v. Young, 160 Iowa, 613, 142 N. W. 393, 396, 46 L. R. A. (N. S.) 947, Ann. Cas. 1915 D, 258. Words and Phrases, Third Series, vol. 7, p. 550.

Also, American Roller Mills v. Com., Dept. of Highways, Ky., 137 SW 2d 725.

12. CAN TRADE FIXTURES BE PAID FOR IN A TAKING?

Chain Belt Co. v. Com., Dept. of Highways, Ky., 391 SW 2d 357, 359 (1965):

It has been held in the majority of states that the owner is not entitled to recover the cost of removing personal property or damages for injury to such property resulting from its removal, since such loss is not a taking of property.

Also, Com., Dept. of Highways v. Shepherd, Ky., 892 SW 2d 58 for the same point.

13. WHEN IS THE DATE OF TAKING?

Com., Dept. of Highways v. Tharp, Ky., 389 SW 2d 453, 456 (1965): The court said that setting the taking date as the date of entering the interlocutory judgment for condemnation against landowners for an urban renewal agency was the proper “taking date” for fixing a value.

Also, cite Urban Renewal and Community Development Agency of Louisville v. Fledderman, Ky., 419 SW 2d 741 (1967) and Com., Dept. of Highways v. Claypool, Ky., 405 SW 2d 674 for the same point.

14. CAN SALES MADE AFTER THE DATE OF THE TAKING BE USED TO INDICATE MARKET VALUE AS OF THE DATE OF THE TAKING?

Yes. Com., Dept. of Highways v. Goehring, Ky., 408 SW 2d 636 (1966) holds that there is no hard and fast rule precluding this method. The only requirement is true and valid comparability. Com., Dept. of Highways v. Maxwell, Ky., 404 SW 2d 9 reiterates, as does Com., Dept. of Highways v. Parker, Ky., 388 SW 2d 366 (1965).

15. WHAT IS THE DIFFERENCE BETWEEN SPECIAL AND GENERAL BENEFITS?

“General Benefits to land resulting from taking a portion thereof by eminent domain are those which adjoining landowners share with the general public.” City of Albuquerque v. Chapman, 413 P. 2d 204, 210, 76 N. M. 162 (1967). Phoenix Title and Trust Company v. State ex rel. Herman, 425 P. 2d 434, 5 Ariz. App. 246.

“Special Benefits are those arising from the peculiar relation of the land in question to the public improvement.” Kirkman v. State Highway Commission, 126 S. E. 2d 107, 112, 257 N. C. 428 (1967). Enterprise Co. v. Sanitary District No. 1 of Lancaster County, 125 N. w. 2d 712, 176 Neb. 271 (1967).

16. WHAT IS THE INTERPRETATION OF STATE LAW REGARDING BENEFITS?

In cases where part of a tract of land is taken by condemnation, the only fact for the appraiser to determine (as concerns damages) is the difference in market value of the tract before and after the taking. In Com., Dept. of Highways v. Sherrod, Ky., 367 SW 2d 844, the Court said:

...The jury should be instructed that in determining the value after the taking, it should take into consideration any enhancement in value growing out of the improvement that is attributable to the advantageous relation of the property to the improvement, as distinguished from general enhancement of values in the community generally to property not even abutting on the improvement...